No. 80-938

In the Supreme Court of the United States

OCTOBER TERM, 1980

BURBANK ANTI-NOISE GROUP, ET AL., PETITIONERS

v.

ANDREW L. LEWIS, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' affirmance of the district court's judgment was correct where the district court had held, as to an environmental impact statement (EIS) prepared by the Federal Aviation Administration (FAA) concerning its decision to provide federal financing for the purchase of an existing commercial airport by local jurisdictions, that even assuming that the EIS was required by law, summary judgment should be entered in favor of the defendants because the EIS met all applicable requirements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 623 F. 2d 115. The oral opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1980. A petition for rehearing was denied on September 8, 1980 (Pet. App. D). The petition for a writ of certiorari was filed on December 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Hollywood-Burbank Airport, located in Burbank, California, was established in 1930 as a privately owned commercial airport serving the greater Los Angeles metropolitan area. The Lockheed Corporation purchased the airport in 1940. By 1973, when Lockheed decided not to continue operating the facility, Hollywood-Burbank Airport was the only privately owned major commercial air terminal in the United States.

Upon learning of Lockheed's decision to cease operating the airport, the City of Burbank and other adjacent communities notified Lockheed of their interest in purchasing the airport and maintaining its use as a commercial air terminal. In 1973, pursuant to the Airport and Airway Development Act of 1970 (AADA), 49 U.S.C. 1701 *et seq.*, the Federal Aviation Administration (FAA) made a grant to Burbank to finance a portion of the cost of a master planning study to determine whether public acquisition of the airport would be feasible and whether the airport should continue to exist as a public air transportation facility. The ensuing master plan report, which was the subject of public hearings, indicated that public acquisition of the airport and its continued use as a terminal were feasible.

As work on the master plan report progressed, the FAA requested that an Environmental Impact Assessment Report (EIAR) be prepared before it considered an application for airport funding under AADA. At the same time, in accordance with the procedures and requirements of the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 *et seq.* (West Cum. Supp. 1980), the Burbank City Council elected to prepare a draft Environmental Impact Report (Draft EIR) and a final Environmental Impact Report (Final EIR). In light of the similar state and federal environmental statutes, local government and federal officials made a policy determination that the most expeditious and economical course would be to prepare a combined EIAR/Draft EIR. A private environmental consulting firm was selected to oversee preparation of the combined EIAR/Draft EIR.

In September 1976, the State of California enacted legislation authorizing the creation of the Hollywood-Burbank Airport Authority (HBAA) and the issuance by it of revenue bonds to finance the airport acquisition. Cal. Gov't Code § 6545.1. That statute also provided in relevant part:

> In operating the airport, the separate public entity above mentioned shall not permit or authorize any activity in conjunction with the airport which results in an increase of the size of the noise impact area based on a community noise equivalent level of 70 decibels as established pursuant to Title [21], California Administrative Code, Chapter 9, Subchapter 6, and shall further comply with the future community noise equivalent levels prescribed by such title as it now exists or is hereafter amended.

The EIAR/Draft EIR was completed in early 1977. Shortly thereafter, the City of Burbank issued a public notice of the completion of the document and held a two-

day public hearing concerning the proposed airport acquisition. Following completion of the public hearings and circulation of the EIAR/Draft EIR at state, regional, and local levels, all comments collected were considered in the preparation of a revised EIAR/EIR by the FAA, the City of Burbank, and the private consulting firm. This document, together with oral and written comments received on the draft, became the final EIR and the draft environmental impact statement ("Draft EIS").

In June 1977, the City Councils of Burbank, Glendale, and Pasadena entered an agreement creating the HBAA. The agreement explicitly limited the authority of the HBAA so that it could not authorize any aircraft operations that would result in an increase in adverse noise effects above the present levels.

The FAA thereafter circulated the Draft EIS among federal, state, and local agencies and among interested persons. The FAA received comments on the Draft EIS, which it analyzed and considered. Following an evaluation, responses to the comments were prepared, and the comments and analyses were incorporated in a summary volume of the EIS. The summary volume, along with the Draft EIS, became the Final EIS.

After completing its evaluation, the FAA recommended to the Secretary of Transportation that federal financial assistance in the amount of approximately $35.5 million be provided to help the HBAA acquire the airport. The FAA recommendation stated that the proposed action included "airport location approval" pursuant to the AADA.[1] In

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[1]Section 16(c)(4) of the AADA, 49 U.S.C. 1716(c)(4), establishes a national policy that airport development projects authorized pursuant to the AADA shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. That provision requires the Secretary of Transportation to consult with the Secretaries of the Interior and Health and Human Services "with

addition, the FAA recommended, as a condition of the funding, that the HBAA agree to operate the airport in such a manner as to produce no increase in noise impacts. The Secretary approved the FAA's recommendation on October 4, 1977. On June 29, 1978, the HBAA purchased the airport from Lockheed with the aid of the FAA grant.

2. This action was filed in federal district court by six homeowners' associations against the FAA and other federal defendants on October 17, 1977.[2] Primarily, the plaintiffs alleged that the EIS that had been prepared regarding funding of the transfer of ownership of the airport did not comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. The State of California, the HBAA, and Lockheed each intervened in the action as defendants.

The district court entered summary judgment in favor of the defendants on May 9, 1978 (Pet. App. A-1 to A-2). In the accompanying oral opinion, the district court held, *inter alia*, that no EIS was required by NEPA because the use of the airport following the conveyance would be identical to

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regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources * * *." The Secretary may not authorize any project under the AADA found to have an adverse effect unless he first renders a written finding "that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect." Such a written finding was made by the Secretary concerning the project at issue.

[2]The plaintiffs had previously filed an action in state court challenging the adequacy of the EIR under the California Environmental Quality Act. *Burbank Anti-Noise Group, et al.* v. *City of Burbank, et al.*, No. C-207043 (Los Angeles Super. Ct.). In addition to the City of Burbank, the Cities of Glendale and Pasadena and the HBAA were named as defendants. The State of California and Lockheed intervened as defendants. The state court granted judgment in favor of the defendants on December 28, 1977, finding that no EIR need have been prepared and, alternatively, that the EIR which had been prepared was adequate. The plaintiffs' appeal from that decision was dismissed.

its prior use; hence, the transfer in ownership would have no significant environmental impacts (Pet. App. B-8 to B-17). In the alternative, the district court held that the EIS filed by the FAA was adequate, assuming that one was required by NEPA (Pet. App. B-18 to B-35).

The court of appeals affirmed on July 14, 1980 (Pet. App. C-1 to C-10). The court of appeals held, among other things, that NEPA does not require a federal agency to file an EIS when the proposed federal action will effect no change in the status quo. The court of appeals did not reach the district court's alternative holding that the EIS was adequate, assuming that one was required by law.

ARGUMENT

As noted above, the FAA in fact prepared an EIS in connection with the funding of the Hollywood-Burbank Airport. Whether or not the court of appeals was correct in holding that the FAA was not required by NEPA to do so, its judgment upholding the district court's grant of summary judgment in favor of defendants is correct and presents no conflict with any decision of this Court or of another court of appeals. Accordingly the decision does not warrant review by this Court.

The final EIS filed by the FAA fully complies with the requirements of NEPA, as the district court found (Pet. App. B-19 to B-34). The preparation of the Final EIS satisfied all procedural requirements of NEPA and it fully discusses the environmental issues associated with the airport's operations, including the noise impacts on the surrounding communities. Much of petitioners' argument in the district court was devoted to their contention that the EIS had employed an invalid methodology for measuring noise impact; but as the district court found (*id.* at B-25), petitioners demonstrated only that there was a disagree-

ment among experts over which methodology was the best.[3] Evidence of a disagreement among experts, however, does not warrant invalidating an EIS. *Environmental Defense Fund, Inc.* v. *Hoffman*, 566 F. 2d 1060, 1069-1070 (8th Cir. 1977); *Cady* v. *Morton*, 527 F. 2d 786, 796 (9th Cir. 1975). As the Second Circuit stated in *County of Suffolk* v. *Secretary of the Interior*, 562 F. 2d 1368, 1383 (1977), cert. denied, 434 U.S. 1064 (1978): "The district court does not sit as a super-agency empowered to substitute its scientific expertise or testimony presented to it *de novo* for the evidence received and considered by the agency which prepared the EIS."

Petitioners also assert (Pet. 8) that the Final EIS is a partisan rationalization of a mind made up in advance. However, while the agency which prepares the EIS must act in good faith, it need not be subjectively impartial, and a party charging bad faith must establish its allegations by the record. *Carolina Environmental Study Group* v. *United States*, 510 F. 2d 796, 801 (D.C. Cir. 1975); *Environmental Defense Fund, Inc.* v. *Corps of Engineers, U.S. Army*, 470 F. 2d 289, 295-296 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973). Petitioners failed to substantiate their charge that the FAA failed to give objective consideration to the

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[3]As petitioners note (Pet. 23-25), they sought to introduce additional evidence on the factual question of noise impact at the rehearing stage in the court of appeals. Petitioners cite this in connection with their contention that the court of appeals improperly found that there had been no major federal action with significant impact on the environment. We note here that whatever the validity of this evidence (the characterization by a congressman of the significance of certain FAA data for periods following the preparation of the Final EIS), it is irrelevant to the question whether the EIS was adequate, since the EIS must be judged in light of the circumstances existing at the time it was prepared. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978). In any event, such a fact-bound question is not appropriate for review by this Court.

relevant environmental considerations. Indeed, petitioners apparently agree that the Final EIS fully discloses the environmental effects of the airport operations, for they state (Pet. 18): "What the Secretary did—based on the EIS—was to approve the location of an airport *which has the environmental impacts shown by the EIS*" (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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